

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
November 15, 2006 Session

**STATE OF TENNESSEE, EX REL. MARK MURRAY**  
**v.**  
**ALMA D. NEISWINTER**

**An Appeal from the Chancery Court for Williamson County**  
**No. 24564     Jeffrey S. Bivens, Chancellor**

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**No. M2005-01983-COA-R3-CV - Filed on February 23, 2007**

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This is a post-divorce petition for criminal contempt for failure to pay child support. The father was designated the primary residential parent for the parties' two children, and the mother was required to make child support payments. The State, on behalf of the father, filed a petition for criminal contempt against the mother for her failure to make the required child support payments. After a hearing, the trial court determined that, for a five-month period, the mother willfully and intentionally failed to make the required payments. She was sentenced to ten days in prison for each offense. The mother now appeals, arguing, *inter alia*, that her conviction must be reversed because the trial court failed to make an explicit finding that she had the ability to make the payments during the five-month period. We affirm, finding that the trial court made the necessary findings of fact, and that the evidence was sufficient to support its conclusion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Trudy L. Bloodsworth, Nashville, Tennessee, for the appellant, Alma D. Neiswinter.

Paul G. Summers, Attorney General and Reporter, and Warren Jasper, Assistant Attorney General, for the appellee, State of Tennessee, ex rel. Mark Murray.

**OPINION**

Mark Murray ("Father") and Respondent/Appellant Alma Neiswinter ("Mother") were twice married and divorced; the second divorce occurred in 1997. Father and Mother have two minor children, Clint Murray (born 07/05/86), and Mark Murray, (born 06/26/88).

This is the third appeal in this case. A brief recap of the prior appeals is necessary to put into context the issues presented in the instant appeal.

In the first appeal, Father was designated as the primary residential parent for the two boys, and Mother was ordered to pay child support. The case was remanded for the trial court to calculate Mother's child support obligations. *See Murray v. Murray*, No. M1999-02081-COA-R3-CV, 2000 WL 827960 (Tenn. Ct. App. June 27, 2000).

On remand, on February 2, 2001, the trial court entered an order requiring Mother to pay Father \$678 per month in child support in accordance with the child support guidelines. *See Neiswinter v. Murray*, No. M2002-02345-COA-R3-CV, 2003 WL 23103967, at \*1 (Tenn. Ct. App. Dec. 31, 2003). The amount of support was based on the fact that Mother had held a job with Astra Pharmaceuticals earning \$37,922 per year until March 2000, shortly before Father was designated as primary residential parent. In March 2000, Mother quit working at Astra Pharmaceuticals and thereafter worked in a series of short-term low-paying hourly-wage jobs. About a year later, in June 2001, Mother filed a petition to reduce her child support payments, arguing that her income had decreased significantly since the entry of the initial child support order. In January 2002, before her petition to modify was heard, Mother was held in contempt for failure to pay child support. For this offense, she served thirty days in jail from January 2002 through part of February 2002. After being released, Mother failed to make the required March child support payment. Therefore, in March 2002, Petitioner/Appellee State of Tennessee ("State"), on behalf of Father, filed a petition to hold Mother in criminal contempt for her failure to make timely child support payments. *Id.* at \*1-\*2. Mother made some payments after that, but not the full amount required in the child support order.

In June 2002, the trial court conducted a hearing on Mother's petition to reduce her child support obligation and on the State's petition for contempt. In her testimony, Mother did not explain her reasons for quitting her job with Astra Pharmaceuticals. She indicated that none of her hourly-wage jobs had lasted longer than eight weeks. *Id.* at \*2-\*3. At the time of trial, Mother had been working as a nursery director for about a month, earning \$11 per hour. She claimed that she had had two miscarriages and other health problems that impacted her ability to maintain regular employment. *Id.* at \*8.

At the conclusion of the trial, the trial court denied Mother's petition to reduce her child support obligation, concluding that Mother was willfully underemployed and capable of earning enough to pay the court-ordered amount of child support. The trial court found Mother in criminal contempt for failing to pay the support, commenting that she had "a lackadaisical attitude to secure employment which would allow her to meet her child support obligations." *Id.* at \*5. Citing her "attitude," the trial court held that Mother was in willful contempt of court. However, the trial court reduced Mother's child support obligation by 50%, to \$339 per month, because the older child, Clint, had been removed from Father's custody and placed in a state facility due to behavioral issues. This reduction in child support was made retroactive to March 2002, when the child was removed from Father's custody.

Mother appealed. On appeal, this Court affirmed the trial court's conclusion that Mother was willfully underemployed. We found that, although Mother blamed her reduced income on her health problems, the evidence she had presented on those claimed health problems was "vague at best." *Id.* at \*8. However, the finding of criminal contempt was reversed because, after taking into account the retroactive reduction in her support obligation, Mother had actually paid the amount of the required child support payments. *Id.* at \*9. On remand, Mother was ordered to maintain the child support payments of \$339 per month ordered by the trial court, as well as \$200 per month toward arrearages.

A little over a year after the conclusion of the second appeal, on February 11, 2005, the State filed the instant petition for criminal contempt against Mother.<sup>1</sup> The State alleged that Mother failed to make the required child support payments and payments for the children's medical expenses. The State alleged that Mother was an able-bodied person and capable of gainful employment and that, therefore, her failure to make the payments as ordered constituted willful and deliberate contempt of the court's orders. The petition requested that Mother be found in criminal contempt of court and sentenced to jail. On February 22, 2005, the trial court issued a show cause order for Mother to appear to defend against the contempt charges. On May 10, 2005, Mother filed a uniform affidavit of indigency. An attorney was appointed for Mother that same day.

On June 21, 2005, the trial court conducted a hearing on the State's petition for contempt. Both Father and Mother testified. During his testimony, Father acknowledged Mother had paid the required medical expenses. He said, however, that Mother remained in arrears in her child support payments. The trial court admitted into evidence State records showing Mother's history of child support payments. The records showed that in January 2004, Mother made a lump sum payment to Father of \$3,500 toward her arrearage. After that, she made only partial payments in varied amounts. Specifically, she paid Father \$269.57 in March 2004, but made no further payments until September 22, 2004. From September 22 through the remainder of 2004, she paid Father a total of \$250. In 2005, prior to the hearing, Mother paid Father a total of \$1,518.46, making her last payment of \$15.64 in May 2005.

Father testified that, to his knowledge, at the time of the hearing, Mother was unemployed but had no disability that would prevent her from working. He estimated that, since he was designated as the children's primary residential parent, Mother had "had about probably 30 jobs," with none of them lasting longer than six weeks. Father said that Mother has work skills; she is bilingual, has an associate's degree, and had been employed by law firms in the past. He noted the trial court's previous finding that Mother was voluntarily underemployed, and remarked that he had had difficulty in collecting the child support from her ever since it was ordered. Citing Mother's earlier bankruptcy filings, Father asserted that she earned about \$24,000 in 2003, and less than that in 2004. Father also determined from Mother's bankruptcy filings and her indigency form that she was receiving State assistance in the form of food stamps, Families First, and child care assistance.

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<sup>1</sup>By the time of trial, on July 5, 2004, Clint had reached majority, but Mark was still a minor.

Father said that Mother lives with her brother and mother in a home in Franklin, Tennessee, worth over \$300,000. He noted that Mother has a laptop computer and access to a vehicle. He asserted that Mother had a membership at an athletic club and an on-line dating service. As of seven weeks prior to the hearing, Father testified, Mother had a cell phone. Father said that, after he and Mother divorced, she married Patrick Neiswinter; they divorced and she is the primary residential parent for their four-year-old child from that marriage.<sup>2</sup> Father testified that Mother receives monthly support from Mr. Neiswinter for the four-year-old child. The record of support Mother received for her four-year-old child was entered into evidence.

Father testified that, between March 2004 and July 2004, Mother lived in Ohio with Mr. Neiswinter. During that period of time, she worked at various jobs but continued to exercise visitation with the parties' sons every other weekend by flying back and forth to Tennessee twice a month. During her month of visitation with their boys in the summer of 2004, Father said, Mother sent Mark on a trip to Cancun, Mexico, for a week. She did not accompany Mark on the trip. Father did not know who paid for that expense.

Mother also testified at the hearing. She acknowledged that she was aware of her obligation to pay \$339 per month in child support, plus an additional \$200 per month for arrearages. Mother testified that she had been employed with her brother's real estate management company, Pluto Properties, as a property manager/administrative executive for about a year and a half until April 2005; at that time, her position was eliminated. Before and during the time she worked for Pluto Properties, she said, she held a variety of other jobs, but she was not certain as to the exact dates. Mother said that, when she moved back to Tennessee from Ohio sometime in mid-2004, she worked at Doctor's Value Vision for a "couple of months."<sup>3</sup> At an unspecified time after that, she worked part-time at World's Gym for about \$11 per hour, but quit that job to seek full-time employment. Subsequently, she worked for a collection company for hospitals, but quit that job, purportedly to work more hours and earn more money. At some point, she attempted to sell beauty products, but quit because the buy-in price was too high. At the hearing, Mother indicated that she had sent out several resumes to obtain employment, but had received no response. She said that she had not been employed since April 2005. Mother testified that, as of the date of the hearing, she recently received an informal job offer to work forty hours per week at Pilot Travel Services as an executive administrative assistant earning between \$12 and \$13 per hour; she indicated that she planned to accept the offer. Mother stated that, in 2003, she earned between \$24,000 and \$26,000, but in 2004 she earned only \$9,000 or \$10,000. Mother acknowledged that she supports herself and her four-year-old son by accepting help from her brother and the rest of her family. Mother noted that she was in the Navy Reserve, and that she attends a weekend drill once a month. Mother said that she

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<sup>2</sup> Mother married Patrick Neiswinter on May 28, 1999, when Mother and Father were embroiled in a prior custody dispute. *See Murray v. Murray*, 2000 WL 827960, at \*2.

<sup>3</sup> Mother stated that she moved back to Tennessee around April 2004, but was not sure about that date. Father testified that Mother returned to Tennessee from Ohio in July 2004. Therefore, the exact date that Mother returned to Tennessee and began working at Value Vision is unclear, though it appears that it was in the spring or summer of 2004.

planned to attend Navy boot camp in August 2005 for three or four weeks, and that her intent was to study to become a paralegal in the Navy.

Initially, Mother claimed that until her position at Pluto Properties was eliminated in April 2005, she had made almost all of the required child support payments to Father. Her subsequent testimony, however, undercut that initial assertion. She admitted that she missed “a couple of” payments during the pertinent time period, but could not recall why. On cross-examination, Mother was asked specifically whether she had been employed between March and September 2004, during which time she made no child support payments whatsoever. Mother replied that she was “not really sure,” and that she had “been in between two or three different jobs due to the being sick and not having a car.” Mother was also asked why she had paid only \$100 in child support during September, October, and November 2004, when she was employed by her brother’s company, Pluto Properties, during that time. Mother again responded that she was not sure, but she speculated that this was a time period in which she suffered a broken rib and twice underwent surgery to have cysts removed.

At the hearing, Mother claimed that she was at that time unable to pay child support. She said that since she lost her job with Pluto Properties in April 2005, her income was limited to her compensation for being in the Navy reserve and State assistance, totaling about \$588 per month. She claimed that, although she lived with her brother, she paid him for rent, food, and utilities whenever she was working. She testified that she had filed for Chapter 7 bankruptcy protection, but said that she hoped to convert the Chapter 7 into a Chapter 13 reorganization case when she started her job at Pilot Travel Services.

Mother confirmed that, when she lived in Ohio in 2004, she flew to Tennessee on occasion to visit the children. She denied, however, that she had visited every other weekend, saying it was not feasible financially. She explained that Mr. Neiswinter had paid for her airline tickets during that time. Mother testified that the \$3,500 she paid to Father in January 2004 was for accrued arrearages, and explained that she borrowed the money from her mother. Evidence was admitted to show that, sometime prior to April 1, 2005, Mother made cash payments to Mark’s tutor of \$1,188, which included some back payments owed to the tutor by Father.

Mother acknowledged that she was bilingual, but said that jobs utilizing that particular skill “don’t pay anything.” The trial judge questioned Mother about her attempts to find employment as a paralegal, in light of her earlier testimony that she worked as a paralegal some fourteen years prior. Mother responded that she had applied for such positions in the area but had received no job offers.

At the conclusion of the hearing, the trial court held that Mother was in criminal contempt of court for her failure to make any child support payments for the months of April, May, June, July, and August of 2004. In reaching its conclusion, the trial court determined that Father’s testimony was credible, and that Mother’s testimony was “not credible in any form or fashion.” The trial court noted that Mother “contradicted herself numerous times on the stand, with regard to employment

questions, [and] has provided vague excuses regarding health issues” as she had done in previous proceedings. The trial court held:

Based upon the evidence here today the Court finds that, in fact, the State has carried its burden of proof in proving beyond a reasonable doubt a willful and intentional violation of a previous Court’s order for non payment of child support for the months of April, May, June, July and August of 2004. The testimony before the Court indicates that during that time, at least a great portion of that time[,] that Ms. Neiswinter was employed. . . . [H]er own testimony acknowledges her flights back from Ohio to Tennessee. And regardless of her explanation as to why that happens, the fact remains the evidence shows no child support whatsoever, zero payments during . . . those months.

The trial court sentenced Mother to ten (10) days in jail for each violation, or a total of fifty (50) days, but ordered her to serve only thirty (30) days of the sentence, with the other twenty (20) days to be suspended. On July 14, 2005, the trial court entered an order consistent with its oral ruling, reiterating that Mother “gave contradictory testimony and vague excuses for not paying child support.” The trial court also found that Mother was \$2,809.13 in arrears in her child support payments. Mother filed an appeal from the trial court’s ruling, *pro se*, and she also filed a motion to find her indigent and to appoint her appellate counsel. Her motion was granted, and counsel was appointed to represent Mother in this appeal.

On appeal, Mother’s argument is two-fold. First, she argues that the trial court failed to make an affirmative determination that she had the ability pay child support, and that such failure requires that her conviction be reversed. Second, she argues that the evidence adduced at trial does not support a finding that she had the ability to pay the child support ordered, asserting that proving that she was employed during the pertinent time does not establish, beyond a reasonable doubt, that she had the ability to make the required payments. In response, the State acknowledges that the trial court did not make an explicit finding that Mother had the ability to pay, but argues that the trial court adequately explained its conclusion that Mother willfully failed to make the required child support payments in April, May, June, July, and August 2004. The State notes the trial court’s explicit findings that Mother admitted to being employed during the months in question, and that her excuses for failing to pay were not credible. The State points out that Mother was found to have contradicted herself numerous times with regard to employment questions and to have provided only vague excuses for her failure to pay. Thus, the State argues, the evidence was sufficient to support the trial court’s holding that Mother was in criminal contempt of court for failure to pay child support during the months in question.

The issue of contempt is governed by Tennessee Code Annotated § 29-9-102(3), which authorizes courts to find a person who willfully disobeys a court order to be in contempt of court. T.C.A. § 29-9-102(3) (2000). Section 29-9-103(b) authorizes up to ten days imprisonment for each violation. *See* T.C.A. § 29-9-103(b) (2000). In order to find that a party’s failure to pay child support was contemptuous under section 29-9-102, “the court first must determine that [the party]

had the ability to pay at the time the support was due and then determine that the failure to pay was willful.” *Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000). The “ability to pay” and “willful failure to pay” elements are distinct findings of fact and both must be proven in order to find a person in criminal contempt. *See Martin v. Moats*, No. M2004-01921-COA-R3-CV, 2006 WL 2527641, at \*2 (Tenn. Ct. App. Aug. 24, 2006). To find the accused guilty of criminal contempt, both elements must be proven beyond a reasonable doubt. *See McPherson v. McPherson*, No. M2003-02677-COA-R3-CV, 2005 WL 3479630, at \*4 (Tenn. Ct. App. Dec. 19, 2005).

“However, on appeal, individuals convicted of criminal contempt lose their presumption of innocence and must overcome the presumption of guilt.” *Sinor v. Barr*, No. M2004-02168-COA-R3-JV, 2006 WL 304699, at \*3 (Tenn. Ct. App. Feb. 7, 2006). The appellate court does not review the record in a light most favorable to the accused; rather, the criminal contempt conviction is reversed only when the evidence is insufficient to support the finding of contempt beyond a reasonable doubt. *Id.*; *see also Levenhagen v. Levenhagen*, No. M1998-00967-COA-R3-CV, 2000 WL 1292446, at \*7-\*8 (Tenn. Ct. App. Sept. 14, 2000). We consider “the evidence in the light most favorable to the prosecution” to determine whether “any trier of fact could have found the essential elements . . . beyond a reasonable doubt. . . . The prosecution is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from it.” *Cottingham v. Cottingham*, 193 S.W.3d 531, 538 (Tenn. 2006) (citations omitted). “Questions regarding the credibility of witnesses, the weight and value of the evidence, and any factual issues raised by the evidence are resolved by the trier of fact.” *Id.*

We first address Mother’s argument that the trial court’s finding of criminal contempt must be reversed because the court failed to make an affirmative finding of her ability to pay. It is undisputed that the trial court did not state explicitly that Mother had the ability to pay during the time in question. As noted above, this element must be proven beyond a reasonable doubt. *See Ahern*, 15 S.W.3d at 79. The State argues that the trial court’s oral decision reflects its implicit conclusion that Mother had the ability to pay in this case.

In the case at bar, we focus on the pivotal time period, April through August 2004, in which the trial court found that Mother made no child support payments whatsoever. The trial court found beyond a reasonable doubt that Mother’s failure to pay was “willful and intentional.” Therefore, we must focus on whether the trial court made an adequate finding of ability to pay \$339 per month in child support plus \$200 per month in arrearages during that period of time.

As background, we recognize that a trial court can rely on its prior findings related to a party’s ability to earn, and these findings are determinative of the party’s ability to earn as of the date of the prior hearing. *See Sinor*, 2006 WL 304699, at \*4. In this case, the trial court found in August 2002 that Mother was voluntarily underemployed and was capable of earning an amount sufficient to support a child support award of \$678 per month. This finding was based on Mother’s unexplained decision to quit a job paying approximately \$38,000 per year in favor of working a

string of lower-wage jobs.<sup>4</sup> The trial court's finding was affirmed by this Court in the second appeal of this case. *Neiswinter v. Murray*, 2003 WL 23103967, at \*8. At the hearing below, the trial court was entitled to rely on this finding of Mother's ability to pay \$678 per month in child support, as of August 2002, as an established fact. Under those circumstances, the issue becomes whether anything had occurred to diminish Mother's established earning capacity.

In the hearing below, the testimony was focused on Mother's employment and employment opportunities during the time period from April through August 2004. Father's testimony, which was credited by the trial court, was to the effect that Mother had work skills, suffered from no disability which would prevent her from working, and was in fact working at a variety of jobs during the pertinent time period. Father's testimony established that, during this time, Mother was flying from Ohio to Tennessee every other weekend in order to exercise her visitation with the parties' children. Also during this time period, Mother was able to fund a trip for Mark for a week in Cancun, Mexico. Mother testified that during this time she was employed by her brother's company, Pluto Properties. She provided other testimony, aptly described by the trial court as "contradictory," about other jobs that she may or may not have held during this time. Mother sought to establish that she no longer had the same earning capacity or ability to maintain stable employment by testifying that her employment had been impacted by a variety of health problems, such as a broken rib and surgery to remove unspecified cysts. Mother's testimony about her inability to work was rejected by the trial court as "vague excuses regarding health issues."

Based on the evidence and its assessment of the witnesses' credibility, the trial court found that Mother was employed during at least a great portion of the pertinent time period, that she was flying between Tennessee and Ohio during this time, that she gave only "vague excuses" for not paying, and that the State had proven the contempt for nonpayment of child support beyond a reasonable doubt. Viewing the proceedings as a whole and the findings in the prior appeal, we must conclude that, regardless of Mother's actual earnings during April through August 2004, the trial court's oral ruling reflects a finding that Mother had retained the same ability to earn as was found in August 2002, and that she had also maintained the same "lackadaisical attitude to secure employment which would allow her to meet her child support obligation." *Neiswinter v. Murray*, 2003 WL 23103967, at \*5. Thus, we conclude that the trial court made a sufficient finding that Mother had the ability to pay the required child support during the contempt period.

Mother also argues that the evidence was insufficient to support such a finding. We disagree. In August 2002, the trial court found that, in light of Mother's unexplained decision to quit a job paying approximately \$38,000 a year and her subsequent job-hopping from one lower-paying job to another, she was willfully underemployed and had the ability to earn an income sufficient to pay \$678 per month in child support. This finding was affirmed on appeal and, as noted above, we take it as an established fact. Against this background, the trial court found that Mother was employed

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<sup>4</sup> As further background, in the first appeal of this case, we noted that Mother "obviously has a problem handling money and meeting [her] commitments," even when she held the job paying \$38,000 per year. *Murray v. Murray*, 2000 WL 827960, at \*4.

during at least a “great portion” of the time period of April through August 2004, and Mother’s testimony described a continuation of the pattern of moving from one lower-paying job to another. Mother’s only proffered reason for not securing and maintaining adequate employment during this time, i.e. health problems, was again discredited by the trial court. Moreover, the trial court noted that Mother apparently used the money available to her for purposes other than paying child support, such as flying between Ohio and Tennessee.

Mother cites numerous cases in which it was determined that the evidence was insufficient to support a finding of ability to pay. In those cases, there was virtually no evidence from which the trial court could find that the obligor parent had the ability to pay during the pertinent time period. *See, e.g., Cottingham*, 193 S.W.3d at 539 (stating that “[t]he record is insufficient . . . to find . . . that [the father’s] failure to pay child support was willful or that he had the ability to pay child support in the amount ordered . . . .”); *Martin*, 2006 WL 2527641, at \*2 (“There is simply *no* evidence in the record regarding Mother’s ability to pay when the child support payments at issue were due.”); *Sinor*, 2006 WL 304699, at \*3 (noting that “the record is . . . devoid of evidence showing that [the father] currently is working or is capable of working, or currently has any income whatsoever”). In contrast, in this case, the evidence presented at the hearing focused on Mother’s employment opportunities during the pertinent time, her job skills and her claimed disabilities, in light of the prior finding on her earning capacity. Taking “the strongest legitimate view of the evidence” in favor of the prosecution and drawing “all reasonable inferences . . . from it,” we find that the evidence was sufficient to support the trial court’s finding that Mother was guilty of criminal contempt for failing to make the required child support payments from April through August 2004. *Cottingham*, 193 S.W.3d at 538.

The decision of the trial court is affirmed. Costs on appeal are to be taxed to Appellant Alma D. Neiswinter, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE